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The Expert Panel on Religious Freedom  
C/O Department of the Prime Minister and Cabinet  
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Australia

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Dear Expert Panel Secretariat

### **Review into the Status of Freedom of Religion or Belief in Australia**

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The LGBTI Legal Service (**Service**) thanks the Expert Panel Members (**Panel**) for considering our submission to this Review into Religious Freedom (**Review**) and the opportunity to provide the panel with details of our experience.

The Service is a non-profit community-based legal service that began operation on 7 July 2010. The organisation was officially launched on 1 December 2010 by our patron former Justice of the High Court of Australia, the Hon Michael Kirby AC CMG.

The Service recognises the difficulties faced by the LGBTI community and seeks to assist the Queensland LGBTI community to gain access to justice through the provision of legal and social welfare services. We also endeavour to provide community legal education activities and resources in order to increase awareness of legal rights and responsibilities for the LGBTI community in Queensland. The Service includes a Law Reform division that actively advocates for law reform and human rights across Australia.

During the recent marriage law survey period, the Service ran a *Like Love* project to monitor, collect information on, and assist individuals to take action in respect of vilification against the LGBTI community. The Service was informed of close to 270 incidences of possible vilification, many under the guise of Freedom of Religion. The Service considers this Review and the balance between Freedom of Religion or Belief and other fundamental rights to be of particular importance to our organisation and the LGBTI Community.

Kind regards



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## 1. Executive Summary

During the Australian Marriage Law Postal Survey period and the announcement of the results on 15 November 2017 much of the public debate focused on whether marriage equality infringed on religious freedoms. Accordingly, Parliament moved to pass the *Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)* (**Marriage Equality Act**). In the context of this debate the Prime Minister announced on 22 November 2017 the appointment of the Panel to conduct the Review. The Marriage Equality Act was the result of extensive public consultation and a robust process that tested the veracity of claims that religious freedoms were being encroached on in Australia. The country voted in favour to end one type of discrimination faced by the LGBTI Community and pass the Marriage Equality Act. This is a clear signal that there is no place in Australia for laws that allow discrimination on the basis of religious freedoms.

This submission covers the relevant international and domestic legal framework and considers the necessity of balancing the right to freedom of religion or belief with the other fundamental human rights. The Service also seeks to provide our experience as a provider of legal advice to the LGBTI community and as an organisation that is actively involved in law reform.<sup>1</sup>

We make the following recommendations to the Panel:

### **Recommendation 1:**

*The Marriage Amendment (Definition and Religious Freedom) Act 2017 struck a fair balance between the competing rights and should not be revisited.*

### **Recommendation 2:**

*Conscientious belief should not be able to be used as a defence to a claim of unlawful discrimination.*

### **Recommendation 3:**

*The Panel should not accept recommendations that seek to limit discrimination protections or increase religious freedoms based on the proposed amendments to the Marriage Amendment (Definitions and Religious Freedom) Act 2017.*

### **Recommendation 4:**

*The exemptions for religions organisations in the Sex Discrimination Act 1984 (Cth) should be narrowed or repealed to prevent discrimination by religious organisations, rather than broadened and/or amended to override state and territory laws.*

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<sup>1</sup> This submission draws on material prepared by Australian Lawyers for Human Rights, The Equality Campaign and the Human Rights Law Centre.

**Recommendation 5:**

*No amendments are necessary to the laws governing tax, DGR status or charitable status as a result of the Marriage Amendment (Definition and Religious Freedom) Act 2017.*

**Recommendation 6:**

Legal protections from discrimination on the basis of religious belief should be included in Australian law and balanced against the right to equality and non-discrimination as part of a comprehensive bill of rights.

**Recommendation 7:**

*Religious exemptions in state and federal anti-discrimination law should be repealed. In particular, the exemptions should not allow discrimination in publicly funded delivery of goods and services, and particularly those services targeting vulnerable population groups (following the example of Commonwealth funded aged care services in s 37(2)(a) of the Sex Discrimination Act).*

**2. Background****2.1. Terms of Reference**

As the Panel's Terms of Reference are quite broad, our submission will focus on all three items, being:

- consider the intersections between the enjoyment of the freedom of religion and other human rights
- have regard to any previous or ongoing reviews or inquiries that it considers relevant; and
- consult as widely as it considers necessary

in the context of the fundamental rights relevant to the LGBTI community in Australia, the Service's clients and stakeholders and the previous reviews the Service has participated in.

**2.2. Principles for Panel to Follow**

Our position is that freedom of religion must be balanced with our human rights. Despite the international human rights position to the contrary, freedom of religion has long trumped other fundamental rights.

The Service also urges the panel to consider that the most appropriate and effective way to balance the competing interests of human rights in a way that works for Australia is to do so with a constitutionally enshrined bill of rights.

Further, the Australia public voted in the Australian Marriage Law Postal Survey vote to end a form of discrimination not to keep it. We submit that the Panel consider this outcome with the view to recommending the removal of further barriers LGBTI face to accessing services,

employment and education. The law, as it stands, impinges too far in the name of religious freedoms on other rights through broad exemptions in federal and state anti-discrimination laws.

### 2.3. Freedom of Religion or Belief Defined

The international instruments do not themselves define “freedom of religion” nor “freedom of belief.” However, it is generally agreed that “freedom of religion and belief”:

- a) includes the freedom to hold secular or atheistic beliefs; and
- b) is further divided into the right to hold or change a belief or no belief, which is unlimited because it has not impact on others, and the right to manifest one’s beliefs, which can be subject to limitations when balanced against other rights because of the potential impact to others.<sup>2</sup>

The United Nations Human Rights Committee has stated that Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief and is not limited to traditional religions.<sup>3</sup> The European Court of Human Rights has also given a wide interpretation to the meaning of religious beliefs as including non-religious beliefs such as pacifism, veganism and atheism<sup>4</sup> and religious or philosophical convictions or beliefs.

*If they attain a certain level of cogency, seriousness, cohesion and importance; are worth of respect in a democratic society; are not incompatible with human dignity; do not conflict with fundamental rights; and, relate to a weighty and substantial aspect of human life and behaviour.*<sup>5</sup>

Commentators note that no one can be genuinely free to do something unless they are also free not to do it and vice versa. That is why freedom of religion or belief also covers the freedom not to profess a religion or belief, not to attend acts of worship and not to participate in community life.<sup>6</sup> Further, one commentator points out that “the scope of the right to freedom of religion or belief is often underestimated, with negative implications for its conceptualization and implementation.”<sup>7</sup>

Therefore, references in the Service’s submission to religious beliefs include reference to non-theistic and atheistic beliefs and philosophical convictions within the meanings given by the European Court of Human Rights.

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<sup>2</sup> The right to freedom of religion or belief and its intersection with other rights (2015) Dr Alice Donald and Dr Erica Howard, Middlesex University, ILGA Europe, available at:

<[http://www.ilgaeurope.org/sites/default/files/Attachments/theright to freedom of religion or belief and its intersection with other rights.pdf](http://www.ilgaeurope.org/sites/default/files/Attachments/theright%20to%20freedom%20of%20religion%20or%20belief%20and%20its%20intersection%20with%20other%20rights.pdf)>, accessed 2 January 2017, p 2. Note that, further there is no absolute right to ‘freedom of conscience’ because this is used as a justification for various manifestations of religious behaviour, such as refusal to enlist in the military, or provide abortions, and has thus been held by European courts (though not by the Human Rights Committee of the United Nations) to be related rather to manifestation of religious belief, not to the simple holding of religious belief: see Donald and Howard, op cit, p 10 and following.

<sup>3</sup> Human Rights Committee, *Comment 22: The right to freedom of thought, conscience and religion (Article 18)*, p 2.

<sup>4</sup> Donald and Howard, op cit, p 2.

<sup>5</sup> Donald and Howard, op cit, p 2.

<sup>6</sup> Bielefeldt, op cit, par 15

<sup>7</sup> Bielefeldt, op cit, par 10.

Further, freedom of religion or belief does not refer to the freedom to follow the majority religion of a certain country or place but rather the freedom to choose between different religions or beliefs to hold or to hold no religion or belief. In that regard, the freedom of religion relies on the concepts espoused by international human rights law because without such standard society would likely only support the dominant religion. This would lead to suppression of subordinate religions and secularism within a certain country. Historically, this is the situation that has occurred in societies that are not based on human rights.

Thus, the human right of freedom of religion or belief is not limited to traditional religions. It also encompasses agnosticism, atheism, secularism and other systems or beliefs which hold to a set of values and principles but would not traditionally be thought of as religions. The Service's interpretation of this human rights stems from both its full title, that is, the '*freedom of thought, conscience, religion or belief*', and from interpretations made by the human rights courts internationally and, in particular, Europe. The interpretation also follows on from the logical argument that to have freedom of something you must also be able to be free from that thing.

Therefore, any discussion of protections for the adherents of traditional religions will also apply to adherents of other religions and beliefs systems including secularism.

Finally, the Service recognises the diverse range of views held by religious people within their own religious communities and it is important to note that it can be erroneous to attribute any specific views to religious communities as a whole.

### 3. General Principles

#### 3.1. Relevant International Law

##### 3.1.1. *Freedom of Religion or Belief*

The right to freedom or religion or belief is reflected in:<sup>8</sup>

- Article 18 of the *Universal Declaration of Human Rights 1948 (UDHR)*
- Article 18(1) of the *International Covenant on Civil and Political Rights 1966 (ICCPR)*; and
- Article 1 of the *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981 (Declaration on Religion or Belief)*

which include freedom to change one's religion or belief and freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief, in worship, teaching, practice and observance.

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<sup>8</sup> See Donald and Howard, op cit, pp 1 to 2.

Within the European Union (EU), the right to freedom of religion or belief is protected in:

- Article 9(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR)*; and
- Article 10 of the *Charter of Fundamental Rights of the European Union (EUCFR)*.

### **3.1.2. Freedom from Discrimination**

Article 2 of the UDHR enshrines the right to be free from discrimination on grounds including sex and status

Also relevant is Article 26 of the ICCPR under which “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. Article 26 is a ‘stand-alone’ right which forbids discrimination in *any law* and in *any field regulated by public authorities*, even if those laws do not relate to a right specifically mentioned in the ICCPR.<sup>9</sup>

Articles 2(2) and 26 of the ICCPR have been held to include sexual orientation<sup>10</sup> as well as Articles 2(2) and 3 of the ICESCR.<sup>11</sup>

It is provided in Article 2(1) of the 1981 Declaration on Religion and Belief that “no one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief”, and Article 3 states that, “Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations.”

### **3.1.3. Other rights**

Many religious practices often promote or require breaches of human rights, in particular the right to be free from discrimination. In Australia, traditional religions commonly seek exclusion from anti-discrimination laws to allow themselves to discriminate in employment situations. Discrimination on the grounds of holding a different religion or holding no religion is common, as is discrimination on the grounds of sexual orientation or gender identity.

These freedoms cannot be truly experienced in the absence of safety. If a person feels or is unsafe because of racist, misogynistic or bigoted hate speech, including hate speech from religious institutions, a person’s own freedoms are being unreasonably restricted and,

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<sup>9</sup> Australian Human Rights Commission (AHRC), *Position Paper on Marriage Equality: Marriage equality in a changing World*, September 2012, available at: < <https://www.humanrights.gov.au/lesbian-gaybisexualtrans-and-intersex-equality-0>>, accessed 12 January 2018.

<sup>10</sup> The United Nations Human Rights Committee has considered two cases from Australia, in which it has expressed the view that one or the other of the categories of ‘sex’ or ‘other status’ protect people from discrimination on the basis of sexual orientation under the ICCPR - see *Toonen v Australia* (488/1992) CCPR/C/50/488/1992, 1-3 IHRR 97 (1994), par 8.7.

<sup>11</sup> Donald and Howard, *op cit*, p 4, footnotes 8 and 9.

conversely, it is justifiable to restrict the behaviours which is unreasonably impinging upon a person's own freedoms.

Further relevant pieces of international law include:

- Preamble and Article 1 of the UDHR which cover the right to be treated with dignity
- Article 7 of the UDHR covering the right to equal protection of the law without discrimination
- Article 12 of the UDHR covering the right to freedom from arbitrary interference with family matters; and
- Article 16 of the UNHR covering the right to marry and to found a family.

### 3.2. Domestic Law

At the Commonwealth level, protections for freedom of religion are provided under section 116 of the Commonwealth of Australian Constitution Act, as well as various provisions of the *Fair Work Act 2009* (Cth),<sup>12</sup> *Migration Act 1958* (Cth),<sup>13</sup> *Age Discrimination 2004* (Cth),<sup>14</sup> *Sex Discrimination Act 1984* (Cth),<sup>15</sup> and the *Evidence Act 1995* (Cth).<sup>16</sup>

There are two important limitations to s 116 of the Australian Constitution. Firstly, s 116 only applies at a federal level meaning there is nothing in s 116 that prevents a State from making a law that establishes a religion, imposes a religious observance, prohibits the free exercise of religion, or imposes a religious test as a qualification for public office.<sup>17</sup> Secondly, s 116 only prohibits the making of laws, meaning that s 116 only directly restricts the exercise of legislative power and therefore any impact it has on judicial or executive power is indirect.

At the State and Territory level there are equal opportunity and anti-discrimination laws which protect freedom of religion through various exemptions. This is in addition to protections provided under s 14 of the Human Rights Act 2004 (ACT), s 14 of Charter of Human Rights and Responsibilities Act 2006 (Vic) and s 46 of the *Constitution Act 1934* (Tas).

#### 3.2.1. Queensland

We refer to ss 25(2) & (3) of the Anti-Discrimination Act 1991 (Qld) (ADA) which state that it is not unlawful for certain religious bodies to discriminate against a person under the ADA “in a way that is not unreasonable...if:

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<sup>12</sup> *Fair Work Act 2009* (Cth) ss 351(1), 351(2)(c), 772(1)(f), 772(2)(b).

<sup>13</sup> *Migration Act 1958* (Cth) s 36(2)(a).

<sup>14</sup> *Age Discrimination 2004* (Cth) s 35.

<sup>15</sup> *Sex Discrimination Act 1984* (Cth) ss 37, 38.

<sup>16</sup> *Evidence Act 1995* (Cth) s 127.

<sup>17</sup> See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.



.... (a) the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer’s religious beliefs—

- (i) during a selection process; or
- (ii) (ii) in the course of the person’s work;
- (iii) or (iii) in doing something connected with the person’s work; and

(b) it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person’s work, act in a way consistent with the employer’s religious beliefs.

We consider that this exemption would allow the religious bodies to discriminate against a transgender person who expresses their gender identity in their employment.

In respect of accommodation that is under the direction or control of a body established for religious purposes, s 90 of the ADA states that it is not unlawful to discriminate if the discrimination is in accordance with the doctrine of the religion concerned and is necessary to avoid offending the “religious sensitivities” of the people of the religion.

We consider that these provisions, and the related provision in s 109 of the ADA, tip the balance too far in favour of freedom of religion and thereby adversely impact other human rights, such as sexual orientation and gender identity.

### **3.3. The Historical Relationship between LGBTI People and Religion**

The relationship between LGBTI people and religion can vary greatly between different religions, time and place and the parts of the LGBTI community a person identifies with. Many of the authoritative bodies of the world’s largest religions view LGBTI people negatively ranging from discouragement to actively opposing LGBTI identities to the incitement of violence and murder.

The Service also recognises that many religious people and religious institutions support LGBTI people as members of their respective congregations and may bless same-sex or gender diverse marriages. The Service also recognises that, historically, some cultures and religions accepted and supported LGBTI people.

Many religious LGBTI people have also faced discrimination from and conflict with people of their own faith. It has been found that these conflicts affect LGBTI people cognitively and emotionally, with suggestions that the most damaging consequences, are the rejection many LGBTI people feel from their religious communities.<sup>18</sup> While renouncement of religious faith can be a short-term and even permanent fix, there are still a number of individuals which regard their faith as important components to their identity.<sup>19</sup>

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<sup>18</sup> Schuck, K. D. and Liddle, B. J. 2001. Religious conflicts experienced by lesbian, gay and bisexual individuals. *Journal of Gay and Lesbian Psychotherapy*, 5: 63–82.

<sup>19</sup>Rodriguez, E. M. 2006. At the intersection of church and gay: Religion, spirituality, conflict and integration in GLB people of faith.

Historically, religious institutions have provided a range of civil services to the community such as education, welfare and health services. We recognise that religious institutions and their affiliated organisations have contributed greatly to the general health care and welfare of many Australians.<sup>20</sup> However, a number of the values and ideologies stemming from the relevant religions have served as barriers for the promotion of healthcare within the LGBTI community – most notably HIV/AIDS prevention and for education, aged care services and homelessness services. Fundamental issues arise when an organisation holds a view to what type of person can access these services when it is derived directly from scripture.

Consequently, this has influenced many religious based organisations to hold a position adverse to members of the LGBTI community particularly in their response to the HIV/AIDS epidemic.<sup>21</sup>

We recognise religious institutions in Australia have progressed greatly over the last few decades and due to advances in understanding and changes to the law no longer discriminate in some areas. This Review is an opportunity to make recommendations on the way to balance the fundamental rights and freedoms people in this country enjoy particularly in relation to the provision of services and to forge a path forward to a more inclusive and equal Australia.

#### **4. The Service's Concerns**

The Service's primary concern in relation to this Review is that Australian legislation and the decisions made by our judiciary should adhere to international human rights law and standards. In the absence of a discussion or issues paper from the Panel, this submission will focus on whether Australian Law adequately protects the human right to freedom of religion in the context of the human rights relevant to the LGBTI community.

Many religions attempt to restrict and/or compel the behaviour of people both within the religion in ways inconsistent with the human rights of those people and externally by not extending tolerance to, or actively discriminating against, people of other faiths (or atheists) and members of the LGBTI community.

The Service believes it is important to acknowledge that there is no hierarchy of rights and that the promotion of other human rights in addition to the right to the freedom of religion can be of great assistance to Australia. In addition, a more nuanced view of the accommodations that need to be made in order to balance the competing human rights is necessary. This viewpoint, while more complex, encourages society and individuals to challenge the aspects of their belief systems that do not accord with human rights. This tolerance works to promote and preserve Australian democracy.

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<sup>20</sup> Ayton, D. Manderson, L. and Smith, B. 2016. Barriers and Challenges Affecting the Contemporary Church's Engagement in Health Promotion, available at: <<http://www.publish.csiro.au/he/pdf/HE15037>>.

<sup>21</sup>Michael Kirby & Patti Shih, "The Worrying Decline in Secularism", 23 November 2010, accessed 28 December 2017, available at: <<https://www.michaelkirby.com.au/images/stories/speeches/2000s/2010/2511-Q--A-PATTI-SHIH-WORRYING-DECLINE-IN-SECULARISM.pdf>>.

To this end, the Service endorses the views of the Parliamentary Joint Committee on Human Rights expressed in Guidance Note 1 of December 2014<sup>22</sup> as to the current climate of the human, civil and political rights obligations of Australia and highlight the Committee's recommendation that the inclusion of human rights safeguards in Commonwealth legislation is directly relevant to Australia's compliance with those obligations.

Generally, Australian law should not protect behaviour that infringes on other human rights. This reflects the indivisible nature of human rights. They are all interrelated, interdependent and indivisible. The right to express a person's religious beliefs does not trump other rights, in particular, the right to be free from discrimination or the right to equality. A secular democratic government should not privilege the right to act on religious views over other human rights.

Human rights also entail both rights and obligations. Hence in so far as we are ourselves entitled to the protection of human rights, we must also respect the human rights of others.<sup>23</sup>

## 5. Submissions

### 5.1. Balancing the Fundamental Rights

Religious freedom includes the right to hold or change a belief or to hold no belief. This right is unlimited because it is personal and therefore has no impact on others. Religious freedom also includes the right to manifest one's beliefs, however, as the manifestation of beliefs can impact on others it must be balanced against the rights of others. This distinction is often blurred but is vital to striking the appropriate balance of rights.

Generally, there is no hierarchy of human rights and one right does not trump another right as all are equally valuable and important, known as the principle of indivisibility, and should be protected together, known as the principle of interdependence. Some rights are non-derogable such as the right to be free from slavery, torture, cruel, inhuman or degrading punishment, or the arbitrary deprivation of life and the right to recognition as a person in law.

The protection of one's beliefs held within is also expressed to be an absolute right as an aspect of both freedom of speech and freedom of religion. Subject to those absolutes, which the Service does not challenge, all rights must be balanced where and when they conflict and provide reasonable accommodation to other rights.<sup>24</sup> This is most commonly understood in

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<sup>22</sup> Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at: <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)> accessed 16 January 2015, see also previous *Practice Note 1* which was replaced by the Guidance Note, available at: <<https://www.humanrights.gov.au/parliamentary-joint-committee-humanrights>>, accessed 16 January 2015.

<sup>23</sup> See generally, United Nations Human Rights Office of the High Commissioner, "What are Human Rights?" available at <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>, accessed 9 February 2017.

<sup>24</sup> Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief* (2015) A/HRC/31/18 pursuant to the UN Human Rights Council Resolution 22/20 (cited as Bielefeldt (2015)) par 19ff. MOVE HIGHER

international law and in jurisdictions where human rights are enshrined in national constitutions such as Canada and all European Countries. In Australia, there is not a common understanding of this well-established point as we do not have constitutionally protected human rights.

Human rights should be considered as process or a set of objectives rather than ends in themselves. They are a means of testing the desirability of outcomes or results that arise from domestic legislation or social and market forces. As freedom of religion is right among many other equally important rights, the right to religious freedoms must be subject to, and balanced against, these other human rights, just as the right to freedom of speech must be subject to, and balanced against, other human rights such as the right to be free from racism, in the form of hate speech. At the same time in both cases it may be necessary to limit or constrain the freedom if it is subject to misuse or abused in way that limits others right and is contrary to the public interest leading to a public harm.<sup>25</sup>

Where the manifestations of different religions conflict, and both parties involved wish to manifest competing religious rights,<sup>26</sup> a balance must be sought by reference to other values and considerations, such as reasonableness, and other rights such as the right to freedom of speech or the right not to be discriminated against. Freedom of religion has been known to lead to other freedoms, including the freedom of expression and freedom of peaceful assembly and association. It is difficult to see, for instance, how there could be free religious community life without having respect to those other freedoms, which are closely woven with the right to freedom of religion or belief itself.<sup>27</sup>

In balancing competing claims of human rights against each other, it is important to minimise any negative impact to intrude as little as possible upon other rights. Therefore, it is important to consider whether a manifestation of a human right by one person or group respects the rights of others or, in the alternate, causes harm or unreasonably and unfairly impacts upon others. If there is a harm or unreasonable impact that results from any behaviour claiming to involve religious freedom, the State should not protect such behaviour by law.

People who push intolerant religions which restrict human rights cannot, therefore, expect tolerance for the expression of their beliefs nor should the State protect their actions. A person's right to hold whatever belief system they wish to hold in private can be respected. Their right to act on that belief depends, however, upon the impact it has on others. This

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<sup>25</sup> Bielefeldt (2015) generally; Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report: Legal Foundations of Religious Freedom in Australia* (Parliament of the Commonwealth of Australia, 2017), 29.

<sup>26</sup> See *Hickin v Carroll* [2014] NSWSC 1059 the New South Wales Supreme Court held that a testamentary requirement that the testator's children convert to Catholicism within three months in order to be entitled to inherit under the Will was a valid condition precedent, rather than striking down the requirement as contrary to public policy.

<sup>27</sup> Bielefeldt, *op cit*, par 33.

principle can be described as ‘respecting the believer rather than the belief’.<sup>28</sup> Further, ‘freedom of religion or belief protects believers rather than the religion or belief’.<sup>29</sup>

Considering the potential harms caused by religious practices it is common to see that religious practices involve breaches of the human rights. Often ministers of religion or followers seek to restrict the human rights of persons outside their group. Discriminatory treatment of women, LGBTI people and religious and ethnic minorities are common examples. For religious people and institutions to truly enjoy the freedom to religion they must respect others.<sup>30</sup>

It is vital Australia holds all behaviour to a certain standard in order to identify and remove discriminatory practices. The State should limit some manifestations or expressions of the freedom of religion or belief in order to protect the enjoyment of the human rights of others, including those persons own religious and belief rights, as the Terms of Reference contemplate, may therefore in many cases provide the best-balanced outcome for society.

## 5.2. Lessons from Marriage Equality

Both the Select Committee on the Commonwealth Government’s exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill and the Marriage Amendment (Definition and Religious Freedoms) Bill provided a pathway that could be used by the government to allow LGBTI couples to marry and strike a balance between freedom from discrimination and freedom of religion.<sup>31</sup> The Service considers the enormous level of consultation and the widespread public and political support for marriage equality lead to the *Marriage Amendment (Definitions and Religious Freedoms) Act* striking the appropriate balance between fairness for LGBTI people and religious freedom in the context of Australia’s marriage laws. This Act contains exemptions for faith based organisations and ministers of religion to perform marriages in accordance with religious beliefs and doctrines. The Act also replicated religious exemptions already available for bodies established for religious purposes under the *Sex Discrimination Act 1984* (Cth) to refuse to provide services to LGBTI people.

### **Recommendation 1:**

*The Marriage Amendment (Definition and Religious Freedom) Act 2017 struck a fair balance between the competing rights and should not be revisited.*

<sup>28</sup> Donald and Howard, op cit, p 17.

<sup>29</sup> Bielefeldt (2015), op cit, par 13.

<sup>30</sup> Bielefeldt, op cit, par 33.

<sup>31</sup> Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (Parliament of the Commonwealth of Australia, 2017). See also the LGBTI Legal Service’s submission to the Select Committee, available:

<[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Same\\_Sex\\_Marriage/SameSexMarriage/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Same_Sex_Marriage/SameSexMarriage/Submissions)>

### 5.3. Rejected Amendments to the Marriage Amendment (Definitions and Religious Freedoms) Bill

During the parliamentary debate for marriage equality a number of amendments were put forward and subsequently rejected. These amendments were, for the most part, drawn from an alternative marriage equality bill – the Marriage Amendment (Definition and Protection of Freedoms) Bill 2017.<sup>32</sup>

During the public and parliamentary debate over these amendments it was proposed that they would be more appropriately considered by the Review. The Service maintains its opposition to the amendments for the following reasons.

#### 5.3.1. Conscientious objections

##### *Marriage Celebrants*

We submit that allowing conscientious objection of marriage celebrants to refuse to solemnise a marriage is allowing individual celebrants to discriminate against LGBTI+ individuals. As mentioned above we will not be expecting religious institutions to be forced to solemnise same sex marriage, so the focus will be on civil marriage celebrants. Australia as a secular state should expect its officers to perform their duties in a secular fashion, regardless of their personal religious beliefs. As current celebrants began the profession prior to same sex marriage being brought into law, we believe the *Marriage Amendment (Definition and Religious Freedoms) Act* provision for current celebrants to opt out of same sex marriage solemnisation is acceptable.

Allowing future celebrants to refuse to solemnise same-sex marriages is discriminatory and creates an obstacle for LGBTI+ Australians to access the same rights as their heterosexual peers.<sup>33</sup> Proponents of a conscientious objection clause argue that forcing celebrants to solemnise the weddings of same sex couples infringes their right to hold a genuinely held religious belief per Article 18(1) of the *International Covenant on Civil and Political Rights*.<sup>34</sup> However Article 18(3) says that this can be modified where prescribed by law and necessary to uphold ‘public safety, order, health, or morals or the fundamental rights and freedoms of others’.<sup>35</sup>

In other jurisdictions, such provisions have been explored. Articles 9(1) and 9(2) of the *European Convention on Human Rights* (ECHR)<sup>36</sup> are the European Union’s equivalent to

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<sup>32</sup> Senator James Paterson, “Media release: Release of draft bill to legalise same-sex marriage and preserve freedoms”, 13 November 2017. Available from: <https://senatorpaterson.com.au/2017/11/13/release-of-draft-bill-to-legalise-same-sex-marriage-and-preserve-freedoms/>

<sup>33</sup> Stijn Smet, ‘Conscientious Objection to Same-Sex Marriages: Beyond the Limits of Tolerating (2016) 11(2) *Religion & Human Rights* 114, 129.

<sup>34</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1).

<sup>35</sup> *Ibid* 18(3).

<sup>36</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) art 9. (European Convention).

articles 18(1) and 18(3) respectively. In the United Kingdom, this a conflict as described by art 9(2) has been held to favour notions of secular law.<sup>37</sup> The United Kingdom does not have a conscientious objection provision.<sup>38</sup> In *Ladele's Case*, the court held that (in response to a claim for unfair dismissal) it was held not to be discrimination of religion, but dismissal on the grounds of refusal to fulfil their public duty. Recent jurisprudence suggests that civil celebrants in the Netherlands are entitled to hold their religious views about marriage, but must not exercise these in order to discriminate in the execution of the official duty.<sup>39</sup> The position is very similar in Canada.<sup>40</sup>

These examples of positions in other jurisdictions are reflective of and consistent with our position that allowing marriage celebrants not to solemnise marriage for LGBTI weddings will allow officers of the Commonwealth to use their office to discriminate.

### ***Provision of Services***

During the Marriage Equality debate, calls were made to strengthen protection for providers of services ancillary to weddings with genuinely held conscientious objections to same sex marriage. Senator Patterson in his alternative marriage equality bill wished to push provisions to effectively prevent conscientious objectors to marriage equality from being sued. This was justified by saying it protected people's right to hold a genuine belief that marriage is between a man and a woman, as protected in the International Covenant on civil and political rights.<sup>41</sup> As stated above however, articles 18(1) must be read subject to article 18(3), allowing contraventions to 18(1) if both lawful and necessary for *inter allia* freedom of others.

We submit that by bringing in protections for service providers to conscientiously object to same sex weddings, they are being granted licence to discriminate against same sex couples because of their sexual orientation. As such, we think such provisions would be contrary to the freedom of others, and should protected. Drawing analogy from above, as with civil servants solemnising same sex couples, if service providers in connection with weddings refuse to provide their services to same sex couples, they are through their discrimination causing detriment, causing said couples to feel as second-class citizens.<sup>42</sup> This is particularly the case in small country towns where there may only be one baker or one florist, or for service providers who provide a unique service, such as vintage car owners.

To that end, we submit that there is nothing in law that suggests that people cannot hold a traditional or religious view of the definition of marriage. However, our submission is that the expression of such views should not allow the allow discrimination against members of the LGBTI community.

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<sup>37</sup> *R (E) v Governing Body of JFS* [2008] EWHC 1535 (Admin), [108].

<sup>38</sup> Bruce MacDougall et al, 'Conscientious Objection to Creating Same-Sex Unions: An International Analysis' (2012) 1(1) *Canadian Journal of Human Rights* 127, 148.

<sup>39</sup> Decision No 2008-40 (2008) CGB.

<sup>40</sup> *Nichols v Saskatchewan (Human Rights Commission)* (2009) SKQB 299.

<sup>41</sup> Explanatory Memorandum, Marriage Amendment (Definition and Protection of Freedoms) Bill 2017 (Cth) 3.

<sup>42</sup> Stijn Smet, 'Conscientious Objection to Same-Sex Marriages: Beyond the Limits of Tolerating' (2016) 11(2) *Religion & Human Rights* 114, 129.

**Recommendation 2:**

*Conscientious belief should not be able to be used as a defence to a claim of unlawful discrimination.*

**5.3.2. No Detriment**

A clause that would have meant religious organisations or people to take any action they like and be immune from adverse consequences or any unfavourable treatment, detriment, disadvantage, obligation, sanction or denial of benefit. This is suggesting a clear imbalance of freedom of religion and at odds with Australian law which does not provide for broad freedom of belief based on one particular religious view or political opinion.

**5.3.3. Exemptions from discrimination protections on the basis of an opinion**

Amendments were proposed to introduce new exemptions from discrimination protections on the basis of a person holding a traditional view of marriage and free speech. They would have provided immunity from existing state and territory discrimination protections such as hate speech, unlawful vilifications and incitement to violence; existing protections from discrimination or adverse actions on the basis of sexual orientation under s 351 of the *Fair Work Act 2009* (Cth); and certain criminal offences which provide protections against serious vilification and offensive conduct. These amendments are unnecessary, flawed and wrong. Australians are able freely express their views in relation to marriage and would have allowed a person who holds a traditional view of marriage to spew hate speech with no consequence.

**Recommendation 3:**

*The Panel should not accept recommendations that seek to limit discrimination protections or increase religious freedoms based on the proposed amendments to the Marriage Amendment (Definitions and Religious Freedom) Act 2017.*

**5.3.4. Broader Ground for Religious Bodies to Discriminate in all Areas**

In relation to this proposed amendment, the Service supports the recommendations and accompanying reasons of the Equality Campaign's Submission to this Review.

**Recommendation 4:**

*The exemptions for religions organisations in the Sex Discrimination Act 1984 (Cth) should be narrowed or repealed to prevent discrimination by religious organisations, rather than broadened and/or amended to override state and territory laws.*

**5.3.5. Religious Charities**

In relation to this proposed amendment, the Service supports the recommendations and accompanying reasons of the Equality Campaign's Submission to this Review.

**Recommendation 5:**

*No amendments are necessary to the laws governing tax, DGR status or charitable status as a result of the Marriage Amendment (Definition and Religious Freedom) Act 2017.*



#### 5.4. Reasonable Accommodations for the Freedom of Religion

The service recognises the importance of the freedom of holding traditional religious beliefs and the manifestation of those beliefs and that in the balance between these rights the need for certain actions based on religious conscience may be excluded from the Anti-Discrimination legislation.<sup>43</sup> In making the distinction between permissible actions, the explanatory memorandum notes that the restriction of rights must only be done to the extent that such are ‘necessary’, noting that the exhaustion of one right over another would violate the principles and purposes of the international convention.<sup>44</sup> We submit that the current exceptions listed within the *Sex Discrimination Act*<sup>45</sup> (SDA) do not strike an appropriate balance between the freedom of religion and other rights.

The SDA provides for several exceptions to various forms of discrimination, including sexual orientation. Such examples include the actions of charities, educational institutions established for religious purposes and voluntary bodies.<sup>46</sup> The actions of religious organisations are also excluded from being considered discrimination, namely in their appointment and training of any religious members or persons appointed to conduct religious purposes, and in the actions, that constitute the practicing of their religion.<sup>47</sup> Examples of such organisations established for religious purposes include:<sup>48</sup>

- aged care providers or retirement villages;
- welfare providers or public benevolent institutions;
- hospitals;
- health promotion charities;
- human rights promotion charities;
- environmental groups;
- camp ground providers;
- organisations established to promote culture (such as faith-based radio stations);
- bodies advancing social or public welfare, which includes faith-based charities with a purpose of: relieving the poverty, distress or disadvantage of individuals or families,
- caring for and supporting:
  - the aged; or
  - individuals with disabilities;
- bodies with the purpose of caring for, supporting and protecting children and young individuals (and, in particular, providing child care services); and
- bodies providing disaster relief.

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<sup>43</sup> *Sex Discrimination Act (Cth)* 1984

<sup>44</sup> Explanatory Memorandum, *Marriage Amendment (Definition and Protection of Freedoms) Bill 2017* (Cth), 52.

<sup>45</sup> 1984 (Cth).

<sup>46</sup> *Ibid*, ss 36, 37, 39.

<sup>47</sup> *Ibid*, s 38.

<sup>48</sup> Explanatory Memorandum, *Marriage Amendment (Definition and Protection of Freedoms) Bill 2017* (Cth), 54.

While the Service accepts that religious institutions should be free to determine who they appoint to certain positions within the institutions the exceptions that organisations established for religious purposes encroach too far onto other rights.

**Recommendation 6:**

Legal protections from discrimination on the basis of religious belief should be included in Australian law and balanced against the right to equality and non-discrimination as part of a comprehensive bill of rights.

**6. Service and Client Experiences**

**6.1. Case Study One**

Client was employed by a Christian organisation which provided amongst other things, aged care facilities. During the Same Sex Marriage Postal survey the client received an email from the CEO of the organisation (sent to all employees) urging all staff in the organisation's employ to vote no in the survey. The email was discriminatory in nature and contained derogatory comments about homosexual persons. The client lodged a complaint with the Human Resources department and was informed that the CEO would write the email again even though he was made aware of the fact that the Client and Client's team mates had found it offensive. The Client was told by the HR Department that as the organisation was linked to a church 'what did she expect'. The email was explicit in its terms talking about 'gay people seeking to destroy marriage' and members of the yes vote having a secret agenda against traditional marriage.

**6.2. Case Study Two**

Client was employed by a Christian organisation offering youth shelter services. Once again an email was received by all staff from the CEO recommending that they vote 'no' in the Same Sex Marriage postal survey. Once again the email was derogatory of homosexual people. A group of employees decided to respond to the email. Client sought clarification from his manager that if he did respond as part of the group that his employment would not be affected. At that time the Client was employed on a casual basis. After being re-assured that his participation in a group response to the CEO's email would not affect his employment, the client did participate. As a consequence, the Client was not offered any further shifts with the organisation.

**6.3. Australian Marriage Law Postal Survey**

During the marriage law survey period, the Service ran a Like Love project to monitor, collect information on, and assist individuals to take action in respect of vilification against the LGBTI community. The Service was informed of close to 270 incidences of possible vilification committed under guise of religious freedom. The Service planned to pursue these

matters pursuant to the *Marriage Survey (Additional Safeguards) Act 2017* (Cth). However, the Act's framework made it impossible to do so as:

- the Service had no standing under the Act,;
- the Service was shut out by the prescribed short limit of three months;
- the Service was potentially exposed to adverse costs orders; and

the Attorney-General's approval was required for relevant Federal Court action.<sup>49</sup>

Much of the potential vilification material collated by the Service includes unlawful hate speech against the LGBTI community purported on behalf of religion. While the law recognises vilification as unlawful, our submission to the Senate Finance and Public Administration Committees Review into Arrangements for the Postal Survey details the failures of the government in protecting vulnerable communities subject to a national vote on their rights. The Service considers the level of type of religious hate speech documents during this period to be an example of the imbalance between the competing human rights where people feel they are publicise vile and hateful speech on the grounds of freedom of religion.

## 7. General Recommendations<sup>50</sup>

### 7.1. Current Measures

Because of the general lack of appreciation of the scope of the human right of freedom of religion and belief, commentators submit, governments commonly and incorrectly:

- privilege private expressions of religion while ignoring rights related to communal and institutional religions, or vice versa, and/or
- privilege one particular type of religion as part of the national heritage, ignoring the principle of equality amongst religions.<sup>51</sup>

### 7.2. How to Strike an Appropriate Balance

The right to manifest one's religion or belief can validly be restricted, according to Articles 9(2) of the ECHR and 18(3) of the ICCPR, if the restriction is prescribed by law and is necessary<sup>52</sup> for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others.<sup>53</sup>

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<sup>49</sup> See the Service's submission to the Senate Standing Committees on Finance and Public Administration inquiry into arrangements for the postal survey: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Finance\\_and\\_Public\\_Administration/postal\\_survey/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/postal_survey/Submissions).

<sup>50</sup> These recommendations are formulated by Australian Lawyers for Human Rights.

<sup>51</sup> Bielefeldt, *op cit*, par 10.

<sup>52</sup> Article 9(2) adds: 'in a democratic society.' The European Court of Human Rights has held that 'necessary in a democratic society' means that the interference must fulfil a pressing social need and must be proportionate to the legitimate aim pursued. This means that there must be a reasonable relationship between the aim of the restriction and the means used to achieve that aim – see Donald and Howard, *op cit*, p 2.

<sup>53</sup> Similar provisions allow restrictions to the freedom of expression: Article 19(3) ICCPR and see Bielefeldt (2015) par 25 ff.

Legislation should thus represent an appropriate and proportionate response to the harms being dealt with by the legislation, and adherence to international human rights law and standards is an important indicator of proportionality.<sup>54</sup> Legislation should not privilege the followers of one religion or belief against another, or discriminate between ‘religions’ or beliefs. Any protection or restriction should be ‘generic’.<sup>55</sup>

In applying human rights law, Donald and Howard point out that European case law establishes the principle that there is no hierarchy of rights amongst human rights, “meaning that in each instance, an attempt [must be] made to maximise each of the rights engaged and to ensure that none is inappropriately sacrificed.”<sup>56</sup> We submit that this is a principle that should be followed in the analysis undertaken by this Inquiry.

The logical conclusion from the principles mentioned above is that constraints upon manifestations of religious freedom, and constraints sought upon other freedoms by those wishing to manifest their own ‘religions’ or beliefs, should in both cases be proportional to the harm identified. Donald and Howard note that:

*in determining whether an interference with the right to manifest one’s religion is justified ... the restriction must have a legitimate aim and the means used to achieve that aim must be proportionate and necessary. This means that a fair balance needs to be struck between the rights of the individual and the rights of others.*<sup>57</sup>

They note also that in European case law:

*The proportionality analysis – the balancing act - is highly contextual and fact-specific and precludes making abstract determinations about competing rights or the outcome of any specific case.*<sup>58</sup>

It is therefore theoretically possible that other rights can validly be restricted to allow or accommodate appropriate and proportional manifestations of ‘religious’ belief. This is the principle of ‘reasonable accommodation’. However, in accordance with the contextual principles mentioned above, it is relevant whether the ‘religious’ manifestation itself amounts to a beneficial or a harmful activity. As the Special Rapporteur on Freedom of Religion or Belief has said, ‘the purpose of reasonable accommodation is not to ‘privilege’ religious or belief-related minorities, at the expense of the principle of equality.’<sup>59</sup>

It has been held that, although teaching of the particular faith is seen as a primary duty for members of many religions, there are many contexts in which that teaching would not be appropriate and can validly be restricted. One such valid restriction is where the teaching

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<sup>54</sup> See generally Law Council of Australia, “Anti-Terrorism Reform Project” October 2013, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-zdocs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf>> accessed 2 January 2018.

<sup>55</sup> See Donald and Howard, p 17.

<sup>56</sup> Donald and Howard, op cit, p I.

<sup>57</sup> Donald and Howard, op cit, p i.

<sup>58</sup> Donald and Howard, op cit, p i.

<sup>59</sup> Interim Report of the Special Rapporteur on Freedom of Religion or Belief (2014) cited in Donald and Howard, op cit, pp 15-16, accessed 10 January 2018 at <<http://www.ohchr.org/Documents/Issues/Religion/A.69.261.pdf>>.

involves violence or brainwashing.<sup>60</sup> The right to manifest one's 'religion' or belief must be balanced with the right of others to be free from interference with one's own 'religion' or belief or to be free from any 'religion' or belief.

Similarly, it may be necessary to limit 'religious' protests and vigils in the vicinity of abortion clinics in the interests of protecting the rights of clinic patients and staff, and to avoid public disorder.<sup>61</sup>

We reject the suggestions that anti-discrimination law conflicts directly with the right to freedom of 'religion' or that anti-discrimination law itself involves religious persecution (the argument being that anti-discrimination law is somehow unfair in that it requires persons holding religious views not to discriminate against others in the name of manifesting their own religion).<sup>62</sup> There is no 'right of conscientious objection' for persons holding discriminatory 'religious' beliefs to:

- refuse to provide goods or services to persons because of those persons' sexual orientation or gender identity, or
- vilify persons because of those persons' sexual orientation or gender identity.

#### **Recommendation 7:**

*Religious exemptions in state and federal anti-discrimination law should be repealed. In particular, the exemptions should not allow discrimination in publicly funded delivery of goods and services, and particularly those services targeting vulnerable population groups (following the example of Commonwealth funded aged care services in s 37(2)(a) of the Sex Discrimination Act).*

### **7.3. Conclusion**

Governments attempting to combat intolerance and incitement to violence based on religion should take account of the rights to freedom of expression and to freedom of religion in conjunction.<sup>63</sup>

These rights are not in opposition and misunderstanding is rooted in the misconception that freedom of religion protects religions or belief systems when it actually protects the human beings who have those beliefs. A person's right to their thoughts is absolute, but the manifestation of their beliefs and actions must be balance against the rights of others.

Any legislation which impacts upon human rights or provides any exemptions from human rights must be narrowly framed, proportionate to the relevant harm, and provide an appropriate contextual response which minimised the overall impact upon all human rights.

Some constraints on the external expression of religious beliefs may from time to time be appropriate in order to protect others from discrimination or breach of their own human rights. The Service urges the Panel to strike the right balance.

<sup>60</sup> Donald and Howard, op cit, pp 8-9.

<sup>61</sup> See Donald and Howard, op cit, p 10.

<sup>62</sup> Donald and Howard, op cit, p1.

<sup>63</sup> Bielefeldt (2015), op cit, par 69ff.